IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976.

No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,

Petitioners,

vs.

AIR PROPERTIES G. INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR THE NINTH CIRCUIT

Petitioners Charles Edward Woodruff, James Gilhooley, East Bay Model Engineers Society, Inc., respectfully pray that a Writ of Certiorari issue to review the dismissal by the United States Court of Appeals for the Ninth Circuit of the appeal from the district court's reclassification of petitioners' class action.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A. The Opinion was reported in summarized form in CCH Fed. Sec. L. Rep. ¶95,657.

JURSIDICTION

The Opinion in the Court of Appeals was filed July 6, 1976. A petition for rehearing in banc was filed on July 20, 1976, and such was denied by order filed August 11, 1976. See Appendices B and C. A motion for an order staying the issuance of mandate was filed on August 18, 1976, and an order staying such issuance until September 10, 1976, was filed on August 19, 1976. See Appendices D and E.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Whether, in determining the "death knell" appealibility of a denial of class status, the court may look only to named, active class members to determine if any has the requisite financial interest at stake to maintain an individual action in federal court; and, if it may look to unnamed, inactive class members, whether it must further determine with realistic cognizable probibility that such an inactive member will prosecute his individual action to final judgment.

B. Since the right to maintain a class action lawsuit is a right protected under the collateral order doctrine, should the appealibility of a denial of the certification of a class in an action brought under the Federal Securities Laws

really be evaluated under the "collateral order" doctrine enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and followed in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), or the "death knell" doctrine delineated in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967), and adopted by the Ninth Circuit. Blackie v. Barrack, 524 F.2d 891, 896 (9th Cir. 1975); Falk v. Dempsey-Tegeler & Co., Inc., 472 F.2d 142 (9th Cir. 1972); and Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 459, 27 L.Ed.2d 451 (1971).

STATEMENT OF THE CASE

On September 30, 1971, the plaintiffs-petitioners commenced an action based upon alleged violations of the Federal Securities Laws, as well as other federal and state statutes, in the sale of certain real property in Paso Robles, California. See Appendix A, incorporated herein by reference. The pertinent details are set forth in pages 2 and 3 of the Court's Opinion below.

On May 17, 1972, the district court, per Judge Lydick, conditionally granted plaintiffs' motion to maintain the action as a class action including within the class approximately 300 investors.

The total amount of investment in this case was about $3,406,000, 40% of which represented the actual initial cash purchase price. This averages to a claim of approximately $4,600 per investor. See page 7 of Appendix B.

On August 20, 1974, the trial court

withdrew certification of the class status, and plaintiffs-petitioners appealed that decision pursuant to 28 U.S.C. §1291. The Court of Appeals dismissed the appeal for lack of jurisdiction on July 6, 1976. Appendix A.

GRANTING A WRIT OF CERTIORARI IS APPROPRIATE IN THIS CASE

Not only does there appear to be a confusion of no minor significance among the circuits with regard to the legal criteria for evaluating the finality of an order denying class certification, but their various modes of disposition of orders of this nature under 28 U.S.C. §1291 make it readily apparent that this Court should definitively set forth the parameters governing the issue of appealibility in those cases such as this one, where most members of a class are in fact effectively precluded from pursuing their cause of action on an individual basis.

Specifically, the Third, Sixth, Seventh, and Tenth Circuits have apparently determined that under no condition will an appeal lie from the denial of class certification (Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969); Thill Securities Corp. v. NYSE, 469 F.2d 14 (7th Cir. 1972); King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Gerstle v. Continental Airlines, 466 F.2d 1374 (10th Cir. 1972); and Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975)) while the Second, Fifth, and Ninth Circuits have concluded (with no real elucidation on the parameters of appealibility) that appeals will be permitted

based on a case-by-case evaluation of the dollar amounts of the claims of the plaintiffs (Eisen v. Carlisle & Jacquelin, supra; Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Graci v. United States, 472 F.2d 124 (5th Cir. 1973), cert. denied, 412 U.S. 928, 93 S.Ct. 2752, 37 L.Ed.2d 155 (1973); Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971); Falk v. Dempsey-Tegeler & Co., supra; and Weingartner v. Union Oil Co., supra.

ARGUMENT

1.

The Court below failed to ascertain the existence of a cognizable probability that any class member could or would maintain an individual action resulting in an eventual final judgment.

The court of appeals below essentially held that no appeal of the denial of a class certification will be permitted until there is a "final" judgment in some untold future litigation pursued by a single claimant or a group of two or more class members. See pages 6 and 7 of the Opinion below, Appendix A. If such a holding was predicated upon either a finding of a cognizable probability or a representation from an active class litigant that such a future litigation would, in fact, be pursued, then the petitioners here would have no quarrel with the disposition below, because the timeliness of an effective appeal would then be assured.

However, the obvious flaw in such a strained and technical construction of the

"finality" doctrine is that the court of appeals assumed (without any reasonable basis for doing so) that some unknown passive member of the class would prosecute an individual action to judgment. See footnote 6 of the Opinion below.

The court of appeals below focused solely on the dollar amount of an individual claim as signifying whether or not the "death knell" has rung in a particular case. See pages 6 and 7 of the Opinion. Yet, upon reflection, it is readily apparent that an exclusive focus on the amounts of each claim alone really only pursues the analysis half-way; the holding below completely overlooked, or ignored, the realistic probabilities of such a "viable" claim being pursued to the all-important final judgment from which the appeal of the order below would ultimately be taken.

In order to be able to conclude that the appeal below was premature under 28 U.S.C. §1291, there must be some factual finding or at least some indicia, apart from a dollar amount, that there will even be a subsequent individual action. To hold an appeal to be premature under §1291 without establishing a cognizable probability that there will ever be an appeal at all is really to compound the inherent flaws in the overly technical, and inpractical, construction of the finality doctrine.

More specifically, the court below noted at page 7 of its opinion that one of the class members "actively engaged in this litigation" has a basic claim of $17,901. The only class members actively engaged in this litigation are the petitioners here, and not one of them has a claim for that amount. Petitioners submit that if the court below attributed to this unknown class member an (unknowable) inclination to proceed with an individual action, such was highly improper because: (1) there existed

no finding of facts from which the court below could have discerned such an implication; and, more important, (2) the previous "death knell" cases which have considered the viability of individual claims have consistently focused on the claims of named active plaintiffs for the simple reason that the named class plaintiffs have already demonstrated their willingness to pursue their claims, if possible. See, for instance, Eisen v. Carlisle & Jacquelin, supra; Korn v. Franchard Corp., supra; City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969); Falk v. Dempsey-Tegeler & Co., Inc., supra; Shayne v. Madison Square Garden Corporation, 491 F.2d 397 (2d Cir. 1974); and Gosa v. Securities Investment Company, supra.

Petitioners submit that, if the "death knell" doctrine were to be properly applied in light of the theoretical foundation of 28 U.S.C. §1291, the initial focus below should have been on the viability of the claims of the named, active plaintiffs. Should that evaluation clearly indicate that no named plaintiff has a claim which could realistically be pursued to judgment in an individual action, the trial court's order should be held as final, unless it is further determined, based on a realistic appraisal of the liklihood that at least one inactive, unnamed class member will in fact puruse his claim individually, that there is a cognizable probability that there will be a subsequent litigation from which an appeal of the disputed order may be taken. This the court below did not do.

The court below specifically pointed to this problem in footnote 6 of its Opinion, yet refused to confront the apparent

inconsistency in its disposition of the matter. A subsequent litigation by the unnamed, inactive class member simply cannot be assumed, because to do so is to ignore the possible legal consequences to the class should that inactive class member fail to pursue his or her claim. If months or years go by with no prosecution, the injustice to the other class members would become more evident.

Since, in that case, one would never really know precisely when the order could be deemed "final", problems would be encountered not only with the time limits for any subsequent appeal, but also with any applicable statute of limitations should no one proceed at all. A defendant might also move to dismiss the entire action for failure to prosecute; of course, if no one in the class indicates any willingness or capability to proceed, such a motion could not realistically be opposed and the entire class would, in all probability, have finally obtained the "final" judgment in a manner not really foreseen, or demanded, by the "final judgment" doctrine.

As succinctly stated by the Ninth Circuit in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975),

> "The requirement [of the finality doctrine] saves judicial time by eliminating review of rulings adverse to an eventually successful litigant." 524 F.2d at page 895; emphasis added.

Petitioners submit that, absent the opportunity for immediate review of the order withdrawing class certification, there is little or no liklihood of individual success in this complex securities litigation. On this point, it should be

pointed out that this case was, and is, on a contingent fee basis. See Appendix B, page 4, and Hackett v. General Host Corp., 455 F.2d 618, 623 (3rd Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972), cited in footnote 1 of the Opinion below.

The final injustice resulting to the class members from the decision below is the very real possibility that the multi--million dollar lawsuit brought by the class can be destroyed by the defendants by merely paying off the $17,901 claim held by the unnamed inactive party which the court held as falling "in the clearly viable range." Page 7 of the Opinion below. Indeed the court below acknowledged this injustice in footnote 6 of its Opinion, but declined to do anything about it:

> "Whether the refusal by a class member having a viable individual claim to pursue his individual remedy or the relinquishment of his claim, as a result of a settlement or otherwise, constitutes a basis to justify a reexamination of the issue of appealability of a denial of class certification is not before us and we express no opinion thereon."

The Court below failed to adequately elucidate whether or not its dismissal of the appeal was based on the "death knell" doctrine or the collateral order doctrine.

The court below seemed to focus on

the "death knell" doctrine exclusively and, for some unexplained reason, it failed to consider the appealability of the class status order under the collateral order doctrine. Such a failure presents two significant problems:

(1) It causes great confusion in that although the court below acknowledged at page 3 of its opinion that the "death knell" doctrine sprang from the collateral order doctrine and that both doctrines "are applicable to a denial of class status," it apparently was so preoccupied with its narrow application of the "death knell" doctrine (which is discussed supra) that it completely failed to analyze the appealability question in terms of the collateral order doctrine; and

(2) An injustice has been committed against the petitioners because as a result of the above-described failure to apply the collateral order doctrine, their right to maintain a class action lawsuit, which clearly is a collateral right protected under the collateral order doctrine, has been effectively destroyed by the trial court and no appeal has been allowed.

It must be kept in mind that there are two rights at stake here. One right, the right to bring a lawsuit under the federal securities laws, was analyzed by the court below under the "death knell" doctrine and the court determined that that right had not been destroyed by the order decertifying the class. However, the court below failed to consider the other right, a collateral right: the right to maintain a class action lawsuit. In the words of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528

(1949) this second right is

> "separable from, and collateral to, rights asserted in the action, [and] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Although the court concluded that the first right was not destroyed, it ignored the undeniable fact that the second right has been destroyed and it is the destruction of this collateral right that should bring into operation the collateral order doctrine. The doctrine was not brought into operation in this case.

This failure by the court below is particularly ironic because the court below expressly stated that the determination of class status is collateral to the merits of the case. See the opinion below at page 8. The court apparently tried to avoid the operation of the collateral order doctrine by noting at page 8 that the trial court's order decertifying the class also turned on a preliminary determination of the merits --- in this case, the issue on the merits was defendants' duty under Rule 10.b-5 and the Federal Securities laws.

However, if this is the proper test for distinguishing class status orders in securities cases from a pure collateral order, than petitioners submit that the order below can only be seen as a decision on the merits (that is, was there reliance by members of the class and what kind), and therefore, the decision was final. To conclude, as the court did below, that "but for decision on the merits, this order

would be collateral" is to judge the case on the merits.

However, petitioners are not arguing at this point whether the decision below should have turned upon the merits of the Rule 10b-5 cause of action. What petitioners do submit is that the collateral order doctrine as articulated in Cohen, supra, and Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) should have applied in this case and it was not. This Court should grant a writ of certiorari to resolve this confusion and to preclude the injustice that has been committed against the class members herein.

CONCLUSION

Petitioners submit that the order denying class status means an effective end to their ability to proceed with their claims, and is a true "death knell".

It is further submitted that if, in fact, other unnamed, inactive class members may be looked to in order to determine if any has the requisite financial interest to sustain an individual action, that the district court must further determine, with some degree of realistic, cognizable probability that such a member will in fact proceed to the critical final judgment in an individual action.

Finally, it is submitted that the court below failed to apply the collateral order doctrine to the trial court's class status order and that such failure contradicts the underpinnings of the doctrine.

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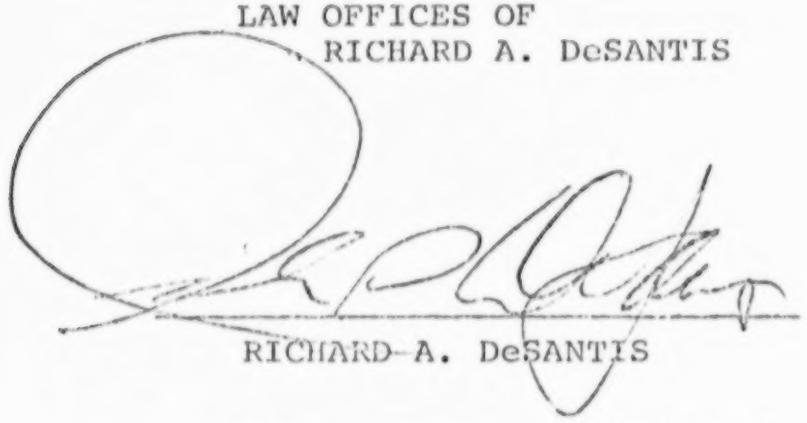
For the foregoing reasons, this Court should grant a writ of certiorari to remedy this confusing contradiction.

Dated: September 9, 1976.

Respectfully submitted,

LAW OFFICES OF
RICHARD A. DeSANTIS



RICHARD A. DeSANTIS

Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,
Plaintiffs-Appellants,

vs.

AIR PROPERTIES G. INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80 LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON O'BRIEN,
Defendants-Appellees.

No. 74-3282

OPINION

[July 6, 1976]

Appeal from the United States District Court
for the Central District of California

Before: GOODWIN and SNEED, Circuit Judges,
and EAST,* District Judge.

SNEED, Circuit Judge:

This case comes before us as an appeal from an order of the district court revoking its tentative class certification. The under-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

AA

lying action is brought by investors in a land development project for violations of various securities and related statutes. Appellants claim jurisdiction for this review under 28 U.S.C. § 1291. There is no jurisdiction to review and therefore we dismiss the appeal.

I. *The Facts.*

Plaintiffs-appellants are investors who acquired undivided interests in parcels of real property which were to be developed into an "Airpark" in the vicinity of Paso Robles Airport. The defendants are the individuals and corporations promoting or otherwise involved with the "Airpark" project. Investors paid 40% of the purchase price of their undivided shares as a cash down payment. A promissory note and deed of trust were executed for the balance. The notes were at the rate of 8% per annum. For the first five years repayment was to be monthly and was to include only interest. For the next ten years monthly payments were to include both principal and interest. The total purchase price paid was about $3,406,000. The deeds of trust securing the balance owed by the investors were subordinate to the deeds of trust executed between the promoters and the original holders of the real estate.

In order to market the undivided interests the promoters made representations in a number of publications concerning the project. In September 1971 defendant Curran, who was apparently the chief promoter of the project, admitted his insolvency. The project appears to have collapsed at that point. On September 30, 1971, plaintiffs commenced this action based upon alleged violations of section 5 of the Securities Act of 1933, 15 U.S.C. § 77e (failure to comply with registration and prospectus requirement), section 10b of the Securities Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder. In addition, plaintiffs allege counts under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1703, 1705, 1707, the California Corporate Securities Act, Cal. Corp. C. § 25,500 et seq., the California Real Estate Act, Cal. Bus. & Prof. C. § 11,000 et seq., the California Subdivision Map Act, Cal. Bus. & Prof. C. § 11,535, and counts of common law fraud and conspiracy to defraud.

On May 17, 1972, the district court conditionally granted plaintiffs' motion to maintain the action as a class action. There were

some 300 investors who were potential class members. The district court issued an order denying class action status on August 20, 1974. It is this order which is on appeal here.

II. *The Issue.*

The question we face is whether the denial of class status in the circumstances of this case may be the basis of an immediate appeal as of right. The parties, following the recent case law, have centered their argument around the so-called "death knell" doctrine of the Second Circuit and, in particular, around the notion of the viability of the named plaintiffs' individual causes of action. *See, e.g., Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971). We believe that this focus is too narrow. Both the "death knell" doctrine and its ancestor, the collateral order doctrine, are applicable to a denial of class status. Moreover, it is our view that the theoretical bases for collateral order and "death knell" appeals have not been properly articulated and are often confused. Hence, we first will set forth our understanding of the "death knell" and "collateral order" doctrines before applying them to the facts of this case.

III. *The "Death Knell."*

The confusion began, albeit unrecognized, when the "death knell" doctrine was first enunciated. *See Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*). The Second Circuit framed the issue in *Eisen I* as the question of whether the facts there fell within the collateral order doctrine. *Id.* at 120. Next the court invoked *Gillespie v. United States*, 379 U.S. 148 (1964) for the proposition that finality is to be given a "practical rather than a technical construction." That court concluded that an appeal would lie in a case where denying an appeal would mean the end of the lawsuit "for all practical purposes." *Eisen I* at 120. The structure of the argument in *Eisen I* made the "death knell" rule appear to be merely a special case of the collateral order doctrine. Some courts continue to discuss the two as if they were interchangeable. *See, e.g., City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969). Other courts have rejected the "death knell" approach without articulating a

distinction between the two rules.[1] It is our view that the collateral order doctrine and the death knell rule represent two distinct but compatible tests for appealability.[2]

The collateral order doctrine provides appellate jurisdiction with respect to asserted rights which do not constitute an ingredient of the basic cause of action and which will be lost forever if the disposition of the trial court is not reviewed on appeal prior to the adjudication of the basic cause. The death knell doctrine, on the other hand, is concerned with survival of the basic cause of action, not merely a right collateral thereto, and is grounded on the notion that a sentence of death should not be passed on a cause of action by only one judge. Its founda-

[1]The leading case rejecting the death knell doctrine is Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). *See also,* King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972). *Hackett* correctly states that the "death knell" rule "will operate primarily if not exclusively in that class of cases in which attorneys are willing to undertake on a contingent fee basis class actions for the recovery of money damages for claimed violations of federal regulatory statutes. These are chiefly the federal antitrust and securities statutes." *Id.* at 623. The *Hackett* court goes on to say that the primary justification for the "death knell" rule is that, by being hospitable to the purported class, it tends "to reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or single-party private enforcement." We disagree. As we state in text, *infra,* the reasons for allowing review in such cases are very much closer to the core of the federal judicial system than any fashionable notion about the usefulness of the class action as a social weapon. It is our view that to deny review in such cases removes from plaintiff his day in court on the merits with too high a probability of error. Nor does certification under 28 U.S.C. § 1292(b) or mandamus solve the problem, as *Hackett* suggests. The very error with which we are concerned is that of the district judge, and it is precisely in those cases where he fails to certify under § 1292(b) where the harm will be manifest. For those cases in which there has been error and no section 1292(b) certification, mandamus, as traditionally formulated, imposes too high a standard to give adequate protection to plaintiffs.

[2]We feel that our view was foreshadowed by Weingartner v. Union Oil, 431 F.2d 26 (9th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971), the first case in this Circuit dealing with the death knell. In that case the collateral order rule *or* the likelihood of irreparable harm to a party were considered alternative justifications for immediate review. *Id.* at 29.

tion is that each litigant deserves not only his day in district court but also his day on appeal. Congress set up the federal judiciary so that litigants are allowed at least "two bites at the apple" before they are foreclosed on the merits—one before a trial court and another before a court of appeals. Presumably this was felt to be the proper balance between achieving finality on the one hand and reducing the probability of error in the individual case on the other. We see no reason why the balance should be differently drawn in the case of a class certification where the individual claims are not viable. This is so even though by the usual criteria the order may be otherwise inappropriate for review. Nonetheless, it is our view that justice demands that we compromise our usual notions of appropriateness for review to avoid the execution of a cause of action on the basis of a decision of a single district judge.[3]

Our compromise should be no broader than necessary to serve its purpose. Thus, we believe that courts must be strict in making the plaintiff demonstrate that the order complained of truly means the death of his action. We agree with the Fifth Circuit that the size of the individual claims, the extent of plaintiffs' resources, and the probable expense of prosecuting the lawsuit

[3]Our view does not conflict with the result in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975). *Blackie* rejected the reverse death knell doctrine in this Circuit. *Id.* at 895-900. We agree. The irreparable harm which justifies the death knell doctrine is the possibility of foreclosing a plaintiff without review. This is a concern which is an integral part of the congressional scheme for the federal judicial system. A grant of class certification does not threaten that harm, but only a loss of money. Thus the death knell doctrine does not apply, but this does not mean that a class certification might not in some cases qualify for appeal under the collateral order doctrine. This was not the case in *Blackie* since the question of certification went to the merits of the case.

We reject the three-pronged test, which appears to be the latest formula of the Second Circuit for solving these problems. *See, e.g.,* Parkinson v. April Industries, 520 F.2d 650 (2nd Cir. 1975). The test requires that: (1) the class action determination be "fundamental to the further conduct of the case"; (2) review of the order be "separable from the merits"; (3) the order cause irreparable harm including the time and money spent in defending a huge class action. Loss of litigation expenses does not qualify a case for death knell treatment. Nor should there be a requirement that an order be "fundamental," in the sense of being essential to the survival of the action, in order to qualify as a collateral order.

are all factors relevant to the issue of viability. *Graci v. United States,* 472 F.2d 124 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973). We also agree that in those cases where the amount in controversy leaves the question of viability in doubt, the plaintiff bears the burden of showing that death to the action would result from the failure to certify the class. *Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971).

There has been confusion over the proper measure of the amount in controversy for the purpose of determining the viability of the action. Plaintiffs here have argued that the proper measure is the "average" claim, the "typical" claim,[4] or the claims of the representative plaintiffs. This is incorrect. If *any* member[5] of the purported class proceeds in an individual action, the class certification can be challenged on appeal by other members of the class, named or unnamed. *See Monarch Asphalt Sales Co. v. Wilshire Oil Co.,* 511 F.2d 1073 (10th Cir. 1975).

Therefore we hold that, if, after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order.[6] It is simply not true, as plaintiffs here claim, that

[4]We find no need to characterize plaintiffs' argument in the more precise language of mean, median, and mode. As the ensuing text makes clear, each of these measures is conceptually incorrect in this context.

[5]It is also true, of course, that if any group of two or more class members go forward the right of appeal is preserved. In certain circumstances it might be appropriate to determine viability by aggregating the claims of a group of class members. *See* Weingartner v. Union Oil Co., 431 F.2d 26, 29 (9th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971). We have no occasion in the context of this case to decide this point. *See* note 8, *infra.*

[6]We reject the argument that so long as any individual claim is not viable the death knell has rung. *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 301 (2nd Cir. 1969) (Hays, J., dissenting). So long as the issue of the refusal of certification may be challenged on appeal the rights of all small claimants are protected to the same extent they would be in any other action. Whether the refusal by a class member having a viable individual claim to pursue his individual remedy or the relinquishment of his claim, as a result of a settlement or otherwise, constitutes a basis to justify a reexamination of the issue of appealability of a denial of class certification is not before us and we express no opinion thereon.

the successful plaintiff in an individual action would have no incentive to challenge a denial of class status. Presumably a reversal of the denial would lead to a greater recovery and hence lower the proportion of plaintiff's individual recovery going to his attorney. Such a challenge has in fact been mounted. *See Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

We believe the "death knell" has not rung in this action. The record reveals that among the class members actively engaged in this litigation there is one individual who purchased his undivided share for $44,752.50. Even if we accept the contention that the amount in controversy is only 40% of this[7]—the cash down payment—the claim is still for $17,901. This falls in the clearly viable range. *See Gosa v. Securities Investment Co., supra.*[8] These figures ignore, in addition to the amount of the note, any claim for interest paid on the notes or for punitive damages. Hence, even when an extremely conservative measure is used, this action is viable.[9] In addition, the record indicates there exist other purchasers of undivided interests having even larger claims.[10]

IV. *The Collateral Order Doctrine.*

Unlike the "death knell" doctrine the collateral order doctrine, properly understood, requires no compromise of the principles of appellate review. *See Cohen v. Beneficial Loans Corp.,* 337 U.S.

[7]There is a controversy between the parties over whether the amount in controversy is to be measured by the purchase price of the undivided interests in land which were sold or by the cash down payment only. We think that the full purchase price measures the amount in controversy. Plaintiffs not only paid cash down payments but also executed notes for the balance. Certainly rescission of those notes is an integral part of the relief they seek. Counts one and two of plaintiffs' Second Amended Complaint request such relief. However, we do not rely on this point in reaching our decision.

[8]The record also reveals two individuals who evidently purchased their shares jointly for a price of $67,128.75. Forty percent of this figure is $26,851.50. *See* n.5, *supra.*

[9]We in no way mean to indicate that such a conservative measure is the most appropriate one in every case. We use it only to underscore our result and to eliminate the necessity to devise a formula for the amount of a claim in a land sale case.

[10]These "other purchasers" are different from the two referred to in note 8, *supra.*

541 (1949). In fact the preconditions the doctrine requires define a type of final order precisely ripe for appellate review. In the words of *Cohen*, the collateral order doctrine grants review "in that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The essence of the doctrine is that there is no reason not to review since as to the aspect of the case in question the proceedings are final. In addition, there is a strong reason to grant review because at least one party will suffer irreparable harm if the order is erroneous.[11]

In a sense the determination of class status is collateral to the merits of the case. However, frequently the issues upon which class certification turns are not separable from the merits. The order of the trial court makes it clear that this is such a case. The trial court's order turned upon an application of the federal securities law of this circuit to the facts of the case. In particular, the denial turned on the application to this case of *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) and *White v. Abrams*, 495 F.2d 724 (9th Cir. 1974). The issue of defendant's duty is at the very heart of the merits of the action as well as being at the heart of the predominance question under Rule 23(b)(3).

Nonetheless, a denial of class certification, even though not a collateral order, under proper circumstances may constitute an appealable order under 28 U.S.C. § 1291. To the extent indicated herein we recognize the "death knell" doctrine in spite of its failure to fit neatly within the collateral order doctrine. In this case the requirements of the "death knell" doctrine were not met.

APPEAL DISMISSED.

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[11]Thus doctrinally the death knell and collateral order doctrines are distinct. They are related, however, in one functional sense. Both are concerned with the question of whether the issue upon which the contested order turns will be litigated again if review is not granted.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 7-12-76—400

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, ET AL.,

Petitioners-Appellants,

v.

AIR PROPERTIES G, INC., ET AL.,

Respondents-Appellees

NO. 74-3192

PETITION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

TO THE HONORABLE JOSEPH T. SNEED, CIRCUIT JUDGE,
THE HONORABLE ALFRED T. GOODWIN, CIRCUIT JUDGE, and
THE HONORABLE WILLIAM G. EAST, U. S. DISTRICT JUDGE

Appellants petition for a rehearing in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 12 of the Rules of the Ninth Circuit in order to reconsider the judgment entered in this action.

I. GROUNDS

This petition is based on the following grounds:

1. In the opinion of petitioners, this Court has clearly misapprehended the practical significance of the crucial facts relating to the amounts of individual claims.

2. In the opinion of petitioners, this Court's Opinion of July 6, 1976, suffers from a lack of clarity as to whether or not the existence of a contingent fee arrangement will necessitate the application of the "death knell" doctrine in the present circumstances.

3. In the opinion of petitioners, and in light of

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this Court's policy of not encouraging a single panel to subsequently overrule an earlier decision even when faced with crucial variations on earlier factual assumptions, the applicability of the "death knell" doctrine under the present circumstances represents an issue of such public importance that it should be definitively decided by the full Court.

II. ARGUMENTS

Petitioner believes these points are substantial for the following reasons:

A. MISAPPREHENSION OF THE PRACTICAL SIGNIFICANCE OF THE CRUCIAL FACTS

This Court's decision of July 6 held that the "death knell" doctrine would not apply if even one class member could proceed in an individual action.[1/] Yet such a narrow doctrine collides significantly with the rule that

> "[T]he requirement of finality is to be given a 'practical rather than a technical construction'." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171, 94 S.Ct. 2140, 40 L.Ed.2d 732, 745 (1974), quoting from Cohen v. Beneficial Loan Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); emphasis added.

More pointedly, in this Court's Opinion, it is stated at pages 6-7 that

> "If any member of the purported class proceeds in an individual action, the class certification can be challenged on appeal by other members of the class, named or unnamed," (emphasis is the Court's).

Footnote 5, page 6, reiterates that

> "It is also true, of course, that if any group of two or more class members go forward the right of appeal is preserved,"

while footnote 6, page 7, states that

> "So long as the issue of the refusal of certification may be challenged on appeal the rights of all small claimants are protected to the same extent they would be in any other action."

Yet the Court, after focusing attention on a major problem area in the above three instances, failed to answer the crucial question which literally begged to be resolved

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1/ Court's Opinion, page 7: "Therefore we hold that, if, after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order."
[It is to be noted that there were approximately 300 investors. Should less affluent purchasers be placed at the mercy of more affluent purchasers who could, but choose not to, pursue their cause of action?]

on the face of the Opinion: In the practical construction of the factual circumstances of this case, how may such small investors[2/] feasibly challenge the denial of class certification when they do not have the requisite financial means with which to proceed with individual actions?[3/]

Technically, the Court's determination that no small investor will be denied his "second bite at the apple"[4/] may be correct. But that is not the point: practically speaking, this Court must be aware of the legal realities of complex litigation (such as this case) when promulgating a rule which, for all practical purposes, will operate to preclude an effective appeal of the denial of the class certification for the small investors who must act as a class to have any effective access to the Courts. The great majority

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2/ The record on appeal clearly indicates that only 10% of the class of plaintiffs could meet the requisite amount in controversy based on the recovery of their cash down payment. [See pages 402-410 of the Clerk's Transcript]

3/ In this regard, the Court apparently overlooked the fact that this class action was, and is, undertaken on a contingent fee basis; see discussion, infra.

4/ See page 5 of this Court's opinion

of the class of plaintiffs in this case simply do not have the financial ability to engage in protracted individual actions. Form should rarely, if ever, prevail over substance in cases where such adherence would, in effect, yield the prospect of a right with no meaningful remedy.

There is scarcely room for doubt that the Supreme Court in Eisen, supra, and also Cohen, supra, indicated that they were fully prepared to disregard any such technicality restricting application of the final order doctrine in factual circumstances such as this case.

In sum, the small investors in this instance will realistically have lost forever their ability to proceed with a cause of action, and will also realistically be denied effective appeal if they are forced to wait until one of the class members proceeds with an individual action.[5/] Should an appeal be taken at that point and the trial court's decision reversed, there will have been an entire trial on the merits which will have been for naught. Such result cannot possibly be that envisioned under any concept of "finality."

B. LACK OF CLARITY

This Court states in its Opinion at page 4, footnote 1:

> "Hackett [v. General Host Corp., 455 F.2d 618, 623 (3d Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460,

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5/ Which, as this Court recognized but failed to resolve, may never occur. See footnote 6, page 7, of the Opinion.

> 32 L.Ed.2d 812 (1972)] correctly states that the 'death knell' rule 'will operate primarily if not exclusively in that class of cases in which attorneys are willing to undertake on a contingent fee basis class actions for the recovery of money damages for claimed violations of federal regulatory statutes. These are chiefly the federal antitrust and securities statutes'," (emphasis added).

The record on appeal in this case shows that this litigation was, and still is, undertaken on a contingent fee basis by counsel for appellants. It is suggested that this is a crucial fact overlooked by this Court; if so, this Court's agreement with the above quotation seems to be prima facie support for application of the "death knell" doctrine in the instant case. The reasoning behind the statement above clearly indicates that such fee arrangements are indicative of the inability of small investors to proceed individually with the hope of recovery of only a few thousand dollars. In the context of the present case and the resulting decision on appeal, it is unclear whether or not this Court was aware of the existence of a contingent fee in this instance.

The Court in its decision makes reference to two other points which are problematic. At page 7 the Court states that "among the class members actively engaged in this litigation there is one individual who purchased his individual

share for $44,752.50." (emphasis ours) We do not know to whom this statement refers since it would not be applicable to Messrs. Share, Gilhooley, Woodruff or East Bay.

Moreover, the Court apparently is not aware that the promissory notes executed in connection with the purchase of the interests does not create personal liability thereon in this instance. Therefore, the dollar amount involved in these circumstances cannot be the purchase price. The amended complaint, as framed, to rescind such notes was as against the Hong Kong Bank which was asserting a position contrary at that time.

Thus, from the standpoint of determining what constitutes an amount small enough to relate to the "death knell" concept, it is the actual dollar mount involved, not the purchase price, which should be considered.

III. ISSUE OF PUBLIC IMPORTANCE; SUGGESTION FOR REHEARING IN BANC

In its Opinion of July 6, this Court adhered to a rigid construction of the policies underlying 28 U.S.C. Section 1291. This Court also made a rather narrow holding based on the technical capabilities of obtaining an appeal of the denial of class certification.[6/]

However, even the Supreme Court of the United States has acknowledged that sometimes a coincidentally novel arrangement of the underlying facts may lead to irreparable harm for those plaintiffs denied immediate review under the constricting policies underlying Section 1291. See, for instance, Cohen, supra, and Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

A rehearing in banc in this instance is appropriate for the following reasons:

1. The present appeal involves a question of public importance concerning the practical accessibility to qualified legal representation in complex litigation; and
2. The present appeal involves a comparatively novel set of underlying factual circumstances (with regard to other Ninth Circuit opinions) more clearly evidencing the potential harm resulting from rigid

6/ See page 7 of this Court's Opinion, and discussion supra.

adherence to 28 U.S.C. Section 1291.

Class action suits are a tremendously potent mechanism for expanding the accessibility to quality legal services for those persons who, because of the financial inability to proceed individually on a "small" claim,[7/] are otherwise without a remedy. Appellants respectfully submit that if this Court's holding is to be used as a precedent in future cases wherein small investors in a securities fraud are left with no realistic remedy, such a holding should be that of the full Court. Otherwise, there certainly exists legitimate concern for the ability of this Court to reappraise its position should there ever occur a more clear-cut case of irreparable harm to small investors occupying positions similar to the present appellants.[8/]

This Court's decision of July 6 also involved a novel set of underlying facts apparently not previously determined

7/ Appellants urge this Court to realistically consider the possibilities of obtaining competent legal counsel to prosecute a complicated securities case where the stakes for an individual plaintiff are a few thousand dollars. It is remarkable how "small" a persons's life savings may become at that point, and appellants urge that undue emphasis is placed on the ability of one or more plaintiffs to proceed individually, thereby forcing the remaining plaintiffs to literally sit out in the cold until the conclusion of litigation which may never occur.

8/ See Judge Friendly's pertinent comments in Parkinson v. April Industries,Inc., 520 F.2d 650, 658-660 (2d Cir. 1975)

in this Circuit. In Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), an appeal was denied where the Court clearly found that all the plaintiffs had the financial means to proceed individually. No such finding was made in this case; indeed, appellants contend that, at most, a small minority of the plaintiffs have even demonstrated the minimum requisite economic capabilities for cases of this type.

In Falk v. Dempsey-Tegeler & Co., Inc., 472 F.2d 142 (9th Cir. 1972), the appeal was denied where the class of plaintiffs consisted of 1,536 customers in 27 states whose accounts were handled by 210 representatives in 36 offices of defendant. The present case is, by comparison, incapable of generating that degree of complexity. The individual plaintiff in Falk also had a claim for $14,125.00; no named petitioner/plaintiff in this case has an actual claim greater than $4,813.00 (see Appellants' Response to Reply Briefs, page 21).

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) is clearly inapposite simply on the facts and the posture of that case on appeal -- class certification had already been granted; the concept of "reverse death knell" was not accepted by this Court.

Wherefore, petitioners respectfully request that this Court grant a hearing in banc.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

DATED: July 19 , 1976.

RICHARD A. DeSANTIS
LAW OFFICES OF RICHARD A. DeSANTIS

By _____
RICHARD A. DeSANTIS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 11 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

RICHARD HUDSON SHARE, et al., Plaintiffs-Appellants,	
vs.	NO. 74-3282
AIR PROPERTIES G., INC., et al., Defendants-Appellees.	O R D E R

Before: GOODWIN and SNEED, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Sneed have voted to reject the suggestion for a rehearing en banc, and Judge East has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Dated: August 11, 1976

RECEIVED
AUG 16 1976
Richard A. DeSantis

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

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OK 8.11.76

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Attorneys for Petitioners-Appellants

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, et al., Petitioners-Appellants, vs. AIR PROPERTIES G, INC., et al., Respondents-Appellees.	No. 74-3282 MOTION FOR AN ORDER STAYING THE ISSUANCE OF MANDATE: ORDER .

Appellants Richard Hudson Share, et al., hereby move this Court for an Order staying the issuance of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure.

The stay is requested so that Appellants may petition the Supreme Court for a writ of certiorari respecting this Court's Opinion in this case filed July 6, 1976. Appellant's Petition for Rehearing en banc was denied on August 11, 1976.

As under Rule 41(a), Fed. R. App. P., this Court's mandate would otherwise issue on August 18, 1976, Appellants respectfully request that this Court stay such mandate, or, should the mandate

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have already issued by the time this motion is received, that such mandate be recalled for thirty (30) days. Perkins v. Standard Oil Company of California, 487 F.2d 672, 674 (9th Cir. 1973).

Dated: August 17, 1976

Respectfully Submitted,
LAW OFFICES OF RICHARD A. DeSANTIS

BY Barry L. Adamson
Barry L. Adamson

United States Court of Appeals
FOR THE NINTH CIRCUIT

FILED
AUG 19 1976
ERIC E. MELEI, JR. CLERK
U. S. COURT OF APPEALS

RICHARD HUDSON SHARE, et al.,
Petitioners-Appellants,
vs.
AIR PROPERTIES G, INC., et al.,
Respondents-Appellees.

No. 74-3282
DC #CV-71-2358 LTL

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Barry L. Adamson, Esq.
counsel for the Appellants (Share et al) and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants (Share et al) herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 10, 1976

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Joseph T. Sneed
Joseph T. Sneed
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.

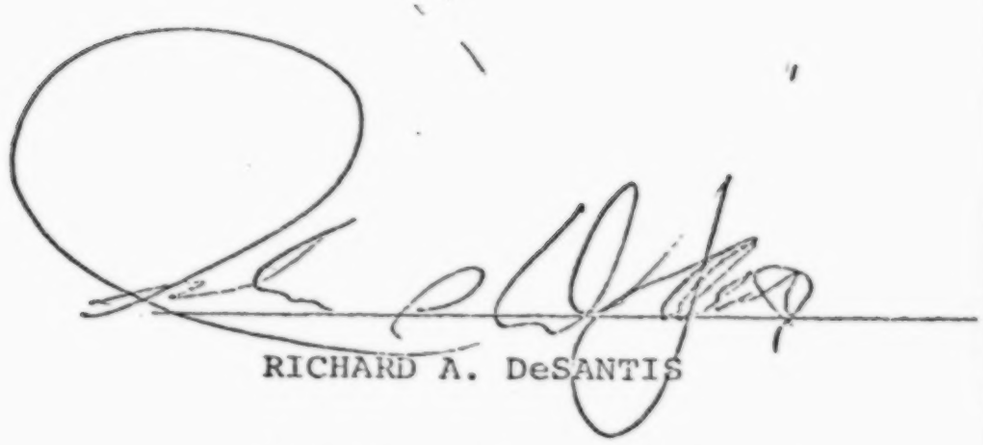
RECEIVED
AUG 23 1976
Richard A. DeSantis

FORM NO. 14

EE

CERTIFICATE OF SERVICE

I certify that this 9th day of September, 1976, I caused three copies of the within Petition for Writ of Certiorari to be served upon each of the respondents in this case by United States mail addressed to said respondents' respective counsel.



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